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Freedom of Movement, Horizontal Effect, and Freedom of Contract

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Abstract: Free movement law follows the contours of freedom of contract very closely. It prevents public or private parties from interfering with the contractual freedom of others. It does not, however, appear to be understood by the Court of Justice to apply to contractual preferences as such. Thus, the gradual extension of its horizontal effect, culminating in *Viking Line*, does not represent a gradual encroachment on freedom of contract but a gradual extension of its power to prevent this freedom being restricted. This contractual orientation has liberalizing consequences that are probably economically inefficient, since they ignore the existing preferences of consumers, who do not always want liberalization. Nor can it be seen as a moral liberalism rooted in principled attachment to liberty: Freedom of contract appears to be instrumentally viewed by the Court, as a tool of integration. Rather, this article suggests that the contractual orientation of free movement reveals it to be an exercise in social engineering, seeking to nudge Europeans into changing their domestic preferences for more European ones.

Résumé: Le droit de la libre circulation suit les contours de la liberté contractuelle de très près. Il empêche les parties publiques ou privées d'interférer avec la liberté contractuelle des autres. Il n'apparaît cependant pas être compris par la Cour de Justice comme s'applicant aux préférences contractuelles en tant que telles. Ainsi, l'extension progressive de son effet horizontal, aboutissant à *Viking Line*, ne représente pas un empiétement progressif sur la liberté contractuelle, mais plutôt une extension progressive de son pouvoir; afin d'empêcher cette liberté d'être restreinte. Cette orientation contractuelle a des conséquences concourant à la libéralisation qui sont probablement économiquement inefficaces, car elles ignorent les préférences existantes des consommateurs, qui ne souhaitent pas toujours la libéralisation. L'orientation contractuelle du droit de la libre circulation ne peut non plus être considérée comme un libéralisme moral enraciné dans l'attachement au principe de liberté. La liberté de contrat semble être considérée instrumentalement par la Cour, qui la voit comme un outil d'intégration. Cette analyse suggère plutôt que l'orientation contractuelle de la libre circulation révèle qu'il s'agit d'un exercice d'ingénierie sociale, cherchant à pousser les Européens à modifier leurs préférences nationales pour des choix plus Européens.

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1. Introduction

This article explores the relationship between the free movement articles of the Treaty on the Functioning of the European Union (TFEU) and freedom of contract. Recent cases apparently extending the horizontal effect of free movement raise the possibility that this law has the potential to intervene intensively in private agreements and invite the question of whether freedom of contract is to be sacrificed on the altar of European integration, and the potentially domestic preferences of private parties are to be rendered partially illegitimate.[1] The finding of the article is however that horizontal effect, as outlined by the Court so far, is a limited doctrine wherein little basis is to be found for impinging on freedom of contract. Private contractual preferences do not, in general, appear to be seen as restrictions on free movement. This is consistent with the vertical effect of free movement law, which functions primarily as a guarantee of freedom of contract. Free movement law, whether vertically or horizontally applied, seems rather to focus on third-party interference with the contracts of others. The conclusion considers what this tells us about the internal market and suggests that it is shown to be a project primarily oriented towards transforming mentalities – an exercise in neither classical liberalism nor orthodox economics but in social engineering.

This article is structured as follows: the following section considers the role of free movement law in the internal market and why its relationship with freedom of contract may be of any importance. The next two sections consider the application of free movement law to public and private measures, respectively (vertical and horizontal effects), and describe the apparently close relationship between free movement and freedom of contract.

2. The Wider Influence of Primary Free Movement Law

Freedom of contract is used in this article in a formal sense to describe a form of party autonomy: the freedom of private persons to choose their contracting partners and the subject of their contracts.[2] That autonomy is impacted upon by all forms of regulation that constrain who may buy or sell certain goods or services, what goods or services may be sold, and on what terms. The most obvious and

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1 ECJ 11 Dec. 2007, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v. *Viking Line ABP and OÜ Viking Line Eesti* [2007] *ECR* I-10779. See J. KRZEMINSKA-VAMVAKA, 'Horizontal Effect of Fundamental Rights and Freedoms – Much Ado about Nothing? German, Polish and EU Theories Compared after Viking Line', *Jean Monnet Working Paper 11/09*, 2009; A. DASHWOOD, 'Viking and Laval: Issues of Horizontal Direct Effect', in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, vol. 10, 2007–2008, Hart, Oxford 2008, p. 525.

2 S. GRUNDMANN, 'Information, Party Autonomy and Economic Agents in European Contract Law', 39. *CMLRev (Common Market Law Review)* 2002, p. 269. *Cf.* A. COLOMBI CIACCHI, 'Party Autonomy as a Fundamental Right in the European Union', 6. *European Review of Contract Law* 2010, p. 303.

substantial impact of the internal market on party autonomy therefore results from the mass of secondary legislation regulating standards, qualifications, and consumer rights.[3] The role of primary Treaty law in general, and in the story of the internal market and private laws, is residual and decreasing. One may therefore ask why it is worth devoting a paper to primary law and freedom of contract. Does the subject matter? Is it possible to conclude anything from such a partial view?

Primary Treaty law and secondary legislation are not however separate worlds of law but enjoy a complicated interrelationship, in which the former influences the latter in several ways. Most relevant here is that application of the Treaty often creates the conditions for later legislation.[4] Application of free movement rights to a new field of national law destabilizes policy in this area and helps to create the political impetus for harmonization.[5] The free movement of patients, the equivalence of qualifications, the standardization of consumer goods, and the services directive are all examples of this.[6] Where primary law goes, legislation often follows, reason enough to want to understand the limits of the Treaty.

Moreover, as these same examples show, the substance of the legislation that results often reflects the concepts and logic of the initial judgments in that field. Why this may be is open to discussion: The conventional story that the Court's insights are adopted by the Commission and translated into legislative proposals has been challenged by the view that it may be the Commission that first puts these concepts into circulation within the institutions and the Court that then applies them when the circumstances invite, or indeed there may be some more complex relationship.[7] However, whether the Court's judgments on the Treaty are to be seen

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3 See, e.g., H. EIDENMÜLLER *et al.*, 'Towards a Revision of the Consumer Aquis', 48. *CMLRev* 2011, p. 1077.

4 W. KERBER & R. VAN DEN BERGH, 'Mutual Recognition Revisited: Misunderstandings, Inconsistencies, and a Suggested Reinterpretation', 61. *Kyklos* 2008, p. 447; K.J. ALTER & S. MEUNIER-AITSAHALIA, 'Judicial Politics in the European Community. European Integration and the Pathbreaking Cassis de Dijon Decision', 26. *Comparative Political Studies* 1994, p. 535; G. DAVIES, 'Is Mutual Recognition an Alternative to Harmonization? Lessons and Tolerance of Diversity from the EU', in L. Bartels & F. Ortino (eds), *Regional Trade Agreements and the World Trade Organization*, p. 265.

5 C.F. SABEL & W.S. SIMON, 'Destabilization Rights. How Public Law Litigation Succeeds', 117. *Harvard Law Review* 2004, p. 1015.

6 ALTER & MEUNIER-AITSAHALIA, n. 4 above; S.L. GREER & S. RAUSCHER, 'Destabilization Rights and Restabilization Politics: Policy and Political Reactions to European Union Healthcare Services Law', 18. *Journal of European Public Policy* 2011, p. 220; G. DAVIES, 'Trust and Mutual Recognition in the Services Directive', in O. Odudu & I. Lianos (eds), *Regulating Trade in Services in the EU and WTO. Trust, Distrust and Economic Integration*, CUP, Cambridge 2012, p. 230.

7 ALTER & MEUNIER-AITSAHALIA, n. 4 above; K. NICOLAIDIS & M. EGAN, 'Transnational Market Governance and Regional Policy Externality: Why Recognize Foreign Standards?', 8. *Journal of European Public Policy* 2001, p. 454; T. NOVAK, *How Judgments Become Law and*

as the source of ideas, or the stamp of judicial approval for them, they often mark the point at which these ideas become official currency and take a central role both in the formulation of law and in the terms of policy debate.[8]

This influence extends after legislation has been adopted. It must then be interpreted, and courts will do this in the light of the basic principles of the internal market, as expressed by the Court in its judgments on the Treaty. These provide the conceptual framework within which secondary law must fit. This process is aided by the fact that secondary legislation usually draws heavily on language and concepts used by the Court in its case law: The judgments become the building blocks of the written law.

Finally, despite the growth of secondary legislation, there is still enough unregulated space for the Treaty articles to matter as such. The sense that most fields are regulated may be misleading, for it takes a static view of the fields to which the internal market applies. By contrast, not only do new technologies, products, and services develop, but the types, purposes, and forms of socio-economic regulation also progress. It is precisely the legal power of the Treaty articles that they are able to flow into each new regulatory space, since, being defined in terms of the achievement of goals, their material scope of application is unbounded. Their history has thus been one of consistent colonization of new areas of law, from criminal law to social security to health care to civil procedure, and as long as there are unharmonized areas of national law, there is likely to be legally significant work for the Treaty articles to do.[9] A study of the scope of the Treaty articles is a study of the potential of the internal market and of its future direction.

3. Party Autonomy and the Vertical Effect of Free Movement Law

Where free movement law is examined, the focus is usually on a single economic actor who wishes to enter a given market. However, entering a market entails concluding contracts with parties in that market. Any measure that restricts economic movement necessarily also restricts the formation of contracts. By reducing the possibilities available to contracting parties, the measure could be said to restrict freedom of contract. Free movement law could be described as a prohibition on restrictions on contracts with an interstate element.[10]

How Law Restricts Judgments. The Influence of the European Court of Justice on the Legislative Process of the European Community, University of Groningen, Groningen 2007.

8 *Ibid.*

9 ECJ 24 Nov. 1998, Case C-274/96 *Bickel and Franz* [1998] *ECR* I-7637; ECJ 28 Apr. 1998, C-158/96 *Kohll* v. *Union des Caisses de Maladie* [1998] *ECR* I-1931; ECJ 16 Dec. 1976, Case 33/76 *Rewe-Zentralfinanz et al.* v. *Landwirtschaftskammer für das Saarland* [1976] *ECR* 1989.

10 GRUNDMANN, n. 2 above, p. 270; *cf.* J. RUTGERS, 'The European Economic Constitution, Freedom of Movement, and the DCFR', 5. *European Review of Contract Law* 2009, p. 95.

However, this is not the same as saying that free movement law embodies a principle of freedom of contract as such. There are two provisos to be addressed before that can be claimed. First, there is the question of what is to be seen as a 'restriction'. In the context of free movement law, the Court has interpreted this widely.[11] Measures that restrict freedom of contract in a conventional sense are certainly caught, such as those that restrict the right of certain persons to enter into contracts – rules that only registered lawyers may offer legal advice, for example – or those that dictate the content of certain contracts – such as product standards – but so are measures that work in a more indirect way.[12] A measure that prevents advertising could be a restriction on free movement in some circumstances, and a measure that prevented itinerant traders from renting market stalls certainly would be.[13] These measures may hinder the formation of contracts between traders and potential customers, but they do not work directly on the contract itself and might not always be seen by private lawyers as restrictions on freedom of contract.

However, a 'restriction' can be defined in various ways both in the context of free movement and of freedom of contract. Is movement to be seen as restricted by a measure that merely adds to costs or imposes a regulatory burden but does not prevent the movement entirely – raising the price of train tickets or limiting opening hours or requiring licenses for websites, for example? A choice for a negative or positive answer is better characterized as a policy choice than as the inevitable outcome of deductive reasoning. Translating the question into contractual language, is a measure that makes it less likely or more difficult that two parties will meet and contract to be seen as a restriction on party autonomy? It does not forbid any choice, nor impose any form of contract, yet its outcome is that certain contractual choices or preferences are burdened, made harder, in a sense punished. Once again, such a measure could be reasonably characterized as a restriction on party autonomy or not. What can be seen is that debates about the notion of a restriction on freedom will have essentially the same form within discussion of freedom of movement and freedom of contract, with the importance of effect and consequences being pitted against the importance of directness and immediacy.

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11 ECJ 11 Jul. 1974, Case 8/74 *Dassonville* [1974] *ECR* 837; ECJ 30 Nov. 1995, Case C-55/94 *Gebhard* v. *Consiglio dell'ordine degli avvocati e procuratori di Milano* [1995] *ECR* I-4165; ECJ 15 Dec. 1995, Case C-415/93 *Union Royal Belge des Sociétés de Football Association (URBSFA)* v. *Bosman* [1995] *ECR* I-4921; E. SPAVENTA, 'From Gebhard to Carpenter. Towards a (non) Economic European Constitution', 41. *CMLRev* 2004, p. 743; generally, C. BARNARD, *Substantive Law of the EU*, 3rd edn, OUP, Oxford 2010.

12 For example, *Gebhard*; ECJ 20 Feb. 1979, Case 120/78 *Rewe-Zentral* v. *Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] *ECR* 649.

13 *Gebhard*; ECJ 3 Oct. 2000, Case C-58/98 *Corsten* [2000] *ECR* I-7919; ECJ 24 Nov. 1993, Joined Cases C-267 & C-268/91 *Keck & Mithouard* [1993] *ECR* I-6097; ECJ 8 Mar. 2001, Case C-405/98 *Gourmet International Products* [2001] *ECR* I-1795; ECJ 13 Jan. 2000, Case C-254/98 *Schutzverband* v. *TK-Heimdienst* [2000] *ECR* I-151.

The following can then be said: Whenever a measure is found to comprise a restriction on movement in the sense that the Court uses this term, it can also be said to comprise a restriction on freedom of contract, in precisely the same sense. This can be turned around: Whenever a measure restricts the freedom of parties to form interstate contracts, it will also amount to a restriction on free movement, using restriction in the same sense in both cases. Free movement law, at least as applied to states, is but a prohibition on restrictions on interstate contract formation.

However, this is still not the same as saying that free movement law aims to guarantee freedom of contract or is even consistent with freedom of contract as a general principle. Free movement law is highly selective in the contractual restrictions with which it is concerned. The Treaty articles on free movement only apply to contracts with an interstate element: Either cross-border contracts or domestic contracts to which one party is foreign.[14] The suspicion may be raised that these do not embody a liberal contractual freedom philosophy but rather seek to replace one normative contractual imposition – the state preference for domestic contract formation – with another one – an EU preference for interstate contract formation.

There is certainly some evidence that free movement law over-promotes interstate contracts in practice. One of the criticisms of mutual recognition and the country of origin principle upon which it relies is that it places foreign market entrants at an advantage by granting them exemption from burdensome regulations to which domestic competitors continue to be subjected.[15] This effect can certainly be opportunistically overstated by disgruntled domestic incumbents who resent the opening of their market, but it remains true that the application of free movement law does not necessarily lead to market equality.

However, this effect needs to be seen in a broader context to be fully understood. First, free movement law only intervenes where a national measure is restricting market access for foreign economic actors.[16] Such an effect inevitably – a few extreme and atypical situations apart – benefits (other) market incumbents who

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14 ECJ 1 Apr. 2008, Case C-212/06 *Government of the French Community & Walloon Government* v. *Flemish Government (Flemish Insurance Case)* [2008] *ECR* I-1683; 133/85 to 136/85 *Rau* v. *Bundesanstalt für Landswirtschaftliche Marktordnung* [1987] *ECR* 2289; ECJ 28 Mar. 1979, Case 175/78 *Saunders* [1979] *ECR* 1129; ECJ 9 Sep. 1999, Case C-108/98 *RI-SAN* [1999] *ECR* I-5219; A. TRYFONIDOU, *Reverse Discrimination in EC Law*, Kluwer Law International, Alphen aan den Rijn 2009; D. HANF, 'Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?', 18. *Maastricht Journal* 2011, p. 29.

15 TRYFONIDOU, pp. 173–215: G. DAVIES, 'Services, Citizenship and the Country of Origin Principle', *University of Edinburgh Mitchell Working Paper 2/2007*, 2007.

16 See n. 14 above.

are protected from competition.[17] A measure that reduces market access therefore always has a protectionist effect.[18] The trigger for the application of the Treaty articles is the existence of this inequality or market distortion. Such inequalities can be seen as restrictions on party autonomy because they make it harder for a party to contract with an out-of-state party and therefore restrict their freedom of choice.

The problem is that the Treaty articles are blunt instruments.[19] Worded as prohibitions, they only allow courts to set aside national measures but not to write alternatives. This is what creates the risk of overshooting from discrimination against the foreign into discrimination in favour of it. Yet if this happens to an extent that is problematic, there is always the option of harmonization, an option that is, of course, often used. The prohibitions in the Treaty articles may not always be enough to create a reasonable level playing field on their own, but they are only part of a market-making process, and that process as a whole is defined in the Treaty and in the Court's case law on harmonization to include the achievement of market equality for all competitors: undistorted competition.[20] It is therefore unconvincing to conclude that free movement law is part of a policy of favouring interstate contracts over domestic ones.

Thus while free movement pursues equality, it does not have the power to always achieve it. This can be explained in terms of its relationship with two aspects of freedom of contract: the freedom of a party to choose with whom they contract and the freedom of the parties to choose the terms of their contract. Free movement law is a law of limited application and it applies quite differently to each of these. While the law aims to provide parties within the internal market with the freedom to choose any other contractual partner within the internal market, it has much less concern with what their contract may contain. This it leaves largely to the Member States, only intervening where a rule on contractual terms has the effect of keeping two contracting parties from each other. Even then, the role of the Treaty articles is usually confined to determining which state's rules are to govern the terms of the contract in question – applying the country of origin principle. Free movement law is about freedom to choose from what is on offer in the internal market but not about what is offered as such. It is therefore not sufficient on its own to achieve freedom of contract, in the sense of contractual choices free of state-imposed distortions, but the work that it does can nevertheless most plausibly be seen in terms of steps towards that goal.

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17 J. SNELL, 'The Notion of Market Access: A Concept or a Slogan?', 47. *CMLRev* 2010, p. 437; G. DAVIES, 'Understanding Market Access', 11. *German Law Journal* 2010, p. 671.

18 *Ibid*.

19 See HANF, n. 14 above.

20 ECJ 5 Oct. 2000, Case C-376/98 *Germany* v. *Parliament & Council (Tobacco Advertising I)* [2000] *ECR* I-8419; Arts 113, 114, and 116 TFEU; Protocol 27 to the TFEU.

4. Party Autonomy and the Horizontal Effect of Free Movement Law

The use of free movement law in horizontal situations has always been presented by the Court as a logical extension of, and complement to, vertical effect, as if it completes the work that the latter begins.[21] Yet a few cases, including the important and recent *Viking Line*, have applied free movement law in a way that suggests it could develop into a significant constraint on private persons' freedom of contract, forbidding private discrimination against foreign parties. That would be a surprising result, oddly in tension with the party autonomy-imbued spirit of its application against states. However, a close look at the cases suggests that horizontal effect is a more limited doctrine than a first glance may suggest.

The central case is now *Viking Line*.[22] In this case, the Court said that:

> 57..... the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy.
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> .....
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> 64. It must be added that, contrary to the claims, in particular, of ITF, it does not follow from the case-law of the Court referred to in paragraph 57 of the present judgment that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers.

The first part of this is entirely orthodox and emphasizes that the fundamental reason for horizontal effect is to prevent avoidance by outsourcing and to promote the effectiveness of the law: Since the law aims to remove restrictions on movement, and it cannot be excluded that private organizations or persons might create such restrictions, they must be subject to the law.

However, in older cases, this situation had primarily arisen where the private body was exercising a quasi-regulatory or quasi-public function, and the application of free movement law to this was easily understood in the light of the logic above.[23]

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21 *Viking Line*, n. 1 above; ECJ 12 Dec. 1974, Case 36/74 *Walrave & Koch* v. *Association Union Cycliste Internationale* [1974] *ECR* 1405; ECJ 6 Jun. 2000, Case C-281/98 *Angonese* v. *Cassa di Risparmio di Bolzano* [2000] *ECR* I-4139; *Bosman*, n. 11 above; ECJ 12 Jun. 2003, Case C-112/00 *Schmidberger* v. *Austria* [2003] *ECR* I-5659.

22 See n. 1. See also ECJ 18 Dec. 2007, Case C-341/05 *Laval* v. *Svenska Byggnadsarbetareförbundet* [2007] *ECR* I-11767.

23 *Walrave*, n. 21 above; *Bosman*, n. 11 above; 13 Dec. 1983, Case 222/82 *Apple & Pear Development Council* [1983] *ECR* 4083; ECJ 18 May 1989, Joined Cases 266 and 267/87 *Royal Pharmaceutical Society* [1989] ECR 1295; ECJ 13 Apr. 2000, Case C-176/96 *Jyri Lehtonen and Castors Canada*

The novelty of *Viking Line* lies in paragraph 64, where the Court makes clear for the first time that horizontal effect is not confined to such situations. This raises the possibility that free movement law might apply to any private action that could be understood as hindering the market access of a foreign economic actor and that this concept might include, for example, a decision to buy domestic goods or to contract with local partners, so that free movement would come to be a significant and direct constraint on freedom of contract.[24] At one extreme, the supermarket that decides to stock only national goods as part of a marketing campaign or the corporation that refuses to contract with foreign suppliers because of the prejudices of its owner might be caught, while at the other the law would have to decide how to deal with the individual who prefers only to sell local or national products from his market stall, or only to buy local and national products for his house, or who would rather not employ a foreign builder for his house or go to a doctor with a diploma from another state.

There is no convincing reason to conclude from *Viking Line* that any of these situations would fall within free movement law or to think that the Court will go down the path towards their inclusion. While it does now appear to be the case that any private action restricting free movement will be caught by the Treaty, that does not answer the question of whether a discriminatory private contractual preference is to be seen a restriction.[25] The case law on horizontal effect – as discussed below – has overwhelmingly concerned a different situation, that in which a private body limits the capacity of two other parties to contract. This third-party intervention in the contractual preferences of others is a different type of action from the exercise of one's own preferences in a contract to which one is a party, and extrapolation from one situation to the other is quite a large step.

There are arguments for and against such extrapolation. It is certainly true that refusals to buy or supply that are based on discriminatory preferences can have a market exclusionary effect. They could be considered to restrict access to the market. Yet the mechanism by which they exclude is fundamentally different from intervention in the contracts of others, and it is also possible to read the Treaty articles as providing a right of access to the consumers and suppliers of other states but not a right that these consumers and suppliers choose to do business with you.

Dry Namur-Braine ASBL v. *Fédération Royale Belge des sociétés de basket-ball ASBL (FRBSB)* [2000] *ECR* I-2681; ECJ 18 Jul. 2006, Case C-519/04 *P Meca Medina and Majcen* v. *Commission* [2006] *ECR* I-6991. *Cf. Angonese*, n. 21 above; ECJ 13 Dec. 1984, Case 251/83 *Haug-Adrion* [1984] *ECR* I-4277; ECJ 3 Oct. 2000, Case C-411/98 *Ferlini* v. *Centre hospitalier de Luxembourg* [2000] *ECR* I-8081. See generally J. BAQUERO CRUZ, 'Free Movement and Private Autonomy', 24. *European Law Review* 1999, p. 603.

24 See KRZEMINSKA-VAMVAKA.

25 See A. HARTKAMP, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law', 18. *European Review of Private Law* 2010, p. 527.

Market access is a policy of market opportunity, not a guarantee of market success. It prevents regulatory hostility but does not provide a right to a warm welcome by other market denizens. There are good policy reasons for maintaining this distinction. Not only would policing a ban on discriminatory contract preferences be extremely difficult, but there would be challenging lines to be drawn between legitimate and illegitimate choices. Why is choosing French wine for dinner acceptable when a preference for a domestic service provider is not?

It is perhaps not surprising that the Court has, in the past, expressed principled hostility to the idea that a private contractual choice is a restriction on movement. *Süllhofer* and *Sapod Audic* are two cases in which a party to a contract complained that one of the terms of that contract restricted their own capacity to engage in interstate trade.[26] Market circumstances were such that they were unable to negotiate the removal of the clause, and so they challenged its entry in the contract as, among other things, a violation of the free movement of goods. In *Süllhofer*, the Court dismissed the argument for the rather unsatisfying reason that the complaint belonged within competition law. In *Sapod Audic*, the primary complaint was that national law had required the offensive clause to be inserted, but the Court rejected this. It concluded in the light of this that '[the] … obligation arises out of a private contract between the parties to the main proceedings. Such a contractual provision cannot be regarded as a barrier to trade for the purposes of Article [34] of the Treaty since it was not imposed by a Member State but agreed between individuals'.[27] This seems to be a clear statement that voluntarily made contractual terms will not be restrictions on trade.

Yet a challenge to this, and support for the view that contractual freedom may be regulated by the Treaty, is apparently provided by two other cases: *Haug-Adrion* and *Ferlini*.[28] In both of these cases, the Court addressed the compatibility with free movement of terms in a private contract. In the first case, concerning a motor insurance contract that disadvantaged those exporting their cars, they found the terms actuarially justified and therefore permissible, but the fact that justification was considered implies that there was no reason of principle why a contractual term should not fall within free movement law. In *Ferlini*, a term in a health services contract that indirectly disadvantaged foreign residents was actually found to violate the Treaty ban on nationality discrimination.

Ferlini is most easily explicable by the fact that the discriminatory fees in question were charged by a consortium of health-care providers that amounted to pretty much the entirety of the Luxembourg hospital system. Thus, while it may

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26 ECJ 27 Sep. 1988, Case 65/86 *Süllhofer* [1988] *ECR* 5249; ECJ 6 Jun. 2002, Case C-159/00 *Sapod Audic* [2002] *ECR* I-5021.

27 Paragraph 74.

28 ECJ 13 Dec. 1984, Case 251/83 *Haug-Adrion* [1984] *ECR* I-4277; ECJ 3 Oct. 2000, Case C-411/98 *Ferlini* v. *Centre hospitalier de Luxembourg* [2000] *ECR* I-8081.

formally have been a private consortium – albeit including at least one public hospital – it had essentially a public function and public status. It is quite common for national health-care systems to include both formally public and formally private organizations, but in the case law on free movement of patients the Court does not appear to consider the distinction between those relevant to the application of the law, where they were part of a national system.[29] This fits with the approach in other areas, where those exercising public power or privileges are bound by the Treaty whatever their formal status under national law.[30] *Ferlini* really falls within the case law on quasi-public organizations, or private regulators, and the well-established principle that those actually able to regulate or control an area of economic activity are subject to the Treaty.[31] The Court cited its case law to this effect when it said in the case that 'According to the case-law of the Court, the first paragraph of Article [18] of the Treaty also applies in cases where a group or organization such as the EHL exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty'.[32] The question that *Ferlini* raises is 'how much power?' At what point does a body become so dominant over its contractual party that it attracts the attention of the Treaty? Must it have power over a whole sector, as in the cases, including *Ferlini*, was the case? Or could bargaining power over the specific contractual partner be enough? The statement in *Ferlini* is broad, but it is not an example of this latter situation, and in *Sapod Audic*, which is such an example, the Court took a different approach. The conclusion must be that it is probably necessary to have at least some form of market power to attract the Treaty, and a mere unequal bargaining position does not make a contract term a violation of free movement law.[33]

Yet there is *Haug-Adrion*. The case does not reveal that the insurance company in question had market power or that its disadvantageous terms were offered by all other insurance companies – although two well-informed commentators have suggested that there was a market-wide approach and the contractual terms were collectively adopted.[34] Switching insurance companies always brings costs and problems, so it may well have been that there was inequality between the contractual parties, a 'certain power' in the terms of *Ferlini*, but this was power specific to their relationship. If that is enough to attract the Treaty, then (the much more recent) *Sapod Audic* is wrong and the horizontal reach of free

29 ECJ 12 May 2003, Case C-385/99 *Müller-Fauré* [2003] *ECR* I-4509.

30 ECJ 12 Jul. 1990, Case C-188/89 *Foster* v. *British Gas* [1990] *ECR* I-3313.

31 See n. 23 above.

32 Paragraph 50.

33 *Cf.* the 'reasonableness' criterion suggested by Advocate General Maduro in *Viking Line*, para. 48 of the Opinion.

34 P. OLIVER & W.-H. ROTH, 'The Internal Market and the Four Freedoms', 41. *CMLRev* 2004, p. 407 at 422.

movement is far indeed, since many commercial contracts will involve a larger, dominant, and a smaller, supplicant, party – supermarket purchasing, supply to large companies, and so on.

There are three reasons to hesitate before reading *Haug-Adrion* in this way. First, the case is more than 20 years old and has not been followed. There has been no development of the idea that private contractual terms can be restrictions on free movement of one of the parties, and the cases above, suggesting the opposite, are more recent. Second, the Court found that there was no restriction because the terms were objectively justified. Logically, justification is only relevant if a measure would otherwise be a restriction. However, where a measure is manifestly reasonable, there will be a clear temptation for the Court to dispose of it quickly on this basis and gloss over the prior doctrinal issue of whether it should fall within the Treaty at all. The result is the same, and the principled difference between the approaches may be of more interest to academics than to judges – which is not to say it has no consequences, but that these consequences are beyond the case itself. Most importantly, third, it is profoundly unclear what the Court was trying to say or decide upon and whether it even intended to rule upon the contract as such. It is quite arguable that *Haug-Adrion* was intended to be a conventional judgment about public measures and no more.

This follows from the facts. Insurance terms of the type in question were regulated by law, and the advocate general's opinion focused exclusively on the question of whether these laws violated the Treaty, which appears to have been what the parties were arguing. The issue was that they permitted but did not require the term in question. When the granting of permission, without an obligation, is sufficient to comprise, a state violation was also relevant to *Sapod Audic* and can be of some complexity; one might think, as the Court found in *Sapod Audic*, that the discriminatory act, if merely permitted, is to be attributed to private parties alone. On the other hand, it is possible to imagine constructions in which permission amounts to tacit support, encouragement, or even public pressure to take a certain approach. The distinctions between requiring, not prohibiting, and permitting may well need precise analysis in some situations, although beyond the scope of this article. However, until the Court's judgment in *Haug-Adrion*, there was no suggestion that the contractual terms as such might violate the Treaty. In that judgment, it is quite unclear whether it is the legality of the terms, the national measure, or the terms as expressions of that measure is in issue. A quote, though lengthy, makes this clear and is worthwhile given the uniqueness of the case:

> 20. It must be observed in that respect that the Court has consistently held that Article [35 TFEU] applies only to national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special

advantage for national products or for the domestic market of the state concerned.

21. National rules such as those in question in the main proceedings do not fall within that category; they merely authorize insurance companies to take into account in their tariff conditions particular circumstances in which vehicles are used which increase or diminish the insurance risk, such as, for example, the use of vehicles registered under customs plates.

22. Quite apart from the fact that the enactment of such rules in a Member State in no way prohibits insurers in that state from granting a bonus in respect of vehicles registered under customs plates, there is nothing to suggest that a tariff condition such as that at issue in the main proceedings, covered by such rules, gives any advantage whatever to national products or to the domestic market of the Member State concerned.

23. The answer to the question put by the national court must therefore be that the refusal of a no-claims bonus to insured persons resident in another Member State who own a vehicle registered under customs plates is not contrary to any provision of Community law, in so far as that refusal is based solely on objective actuarial criteria applied in a non-discriminatory manner.

The first paragraph quoted is apparently clear: The Court is considering the legality of the national rules, as had the advocate general had in his opinion, and in accordance with the case brought by the parties. Yet the text becomes ever more ambiguous until the last paragraph appears to be concluding that the terms themselves are not restrictions, because it is justified as if the case was about the contract, and it is this possibility that caused the case to attract attention for its possible horizontal impact. On balance, it is suggested that this conclusion is more an example of sloppy wording than a sudden decision to draw a horizontal conclusion out of a hat. What the Court probably intended to say is that the national rules do not unlawfully restrict movement for two reasons: One, they do not require the clause, and two, the clause is quite reasonable anyway – even if it were required that would be permitted. The judgment does not therefore provide support for contractual terms as restrictions on movement. It is a conventional case about public measures.

Two other cases are of peripheral relevance: *Dansk Supermarked* and *Vlaamse Reisbureaus*.[35] In both of these cases, the Court made powerful statements that are somewhat less impactful when put in their factual context. In the first case, it found that 'it is impossible in any circumstances for agreements between

35 ECJ 22 Jan. 1981, Case 58/80 *Dansk Supermarked* [1981] *ECR* 181; ECJ 1 Oct. 1987, Case 311/85 *Vlaamse Reisbureaus* [1987] *ECR* 3801.

individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods',[36] an apparently broad finding that nevertheless begs the question of what such a derogation would be. In that case, two parties were attempting to rely on a contract between themselves to argue for a restraint on the trade possibilities of a third. Thus, while a contract may have been in issue, it was not the freedom of a party that was in issue but of another person. This is an example of a contract being used to interfere with the contractual freedom – the possibility to contract with customers – of a third party and thus fits within the thesis of this article that it is third-party interference that offends the law. In *Vlaamse Reisbureas*, the Court ruled unequivocally that the rules on free movement of goods do not apply to undertakings because these are governed by competition law. The absoluteness of this may be doubted given that *Viking* apparently contradicts it and that there is no logical or policy reason why the free movement of goods should be different from the other freedoms. In any case, as the Court went on to note, the facts concerned services rather than goods. The fact that it did not even consider whether there might be a restriction on services but confined itself to irrelevant statements about goods rather undermines the credibility of the judgment as a whole. While *Vlaamse Reisbureaus* supports the idea that the horizontal effect of free movement is limited, it is not a case that deserves great weight.

These few cases where contractual provisions and free movement have interacted are not examples of the Court at its most lucid. The mere fact that there are so few of them may be one of the most powerful arguments that free movement is not understood by the Court, or courts, to regulate private contractual preferences as such, outside of a private regulatory context. The judgments express this view with greater or lesser degrees of clarity, *Sapod Audic* being the clearest and *Haug-Adrion* only managing, ultimately, to throw up one, small, rather faint, question mark.

Yet before it can finally concluded that the exercise of private contractual preferences does not amount to a restriction on free movement, two areas of law that apparently suggest the contrary must be addressed: public procurement and the free movement of workers. These are the only two areas in which the Court actually has found that the exercise of a contractual preference by a contracting party could offend the free movement rules. In the case of workers, it is quite explicit that Article 45 TFEU prevents discrimination against foreign workers in all aspects of employment,[37] while in the case of procurement such discrimination is prohibited in government purchasing, not just by the relevant directives, but by the

36 Paragraph 17.

37 *Angonese*, n. 21 above; ECJ 17 Jul. 2008, Case C-94/07 *Raccanelli* v. *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* [2008] *ECR* I-5939.

Treaty articles on free movement as applied by the Court. Discriminatory government purchasing preferences are restrictions on movement.[38]

Each of these has its own legal nuances. The Treaty article on free movement of workers is atypically worded and contains – unlike the other free movement articles – a ban on discrimination, which makes extension of the article to contracting parties much more defensible.[39] It is this discrimination rule that has been relevant to both cases in which Article 45 has been applied horizontally rather than the preceding sentence of the article, which, like the other Treaty articles, refers to free movement.[40] It is easy to make a textual case that employment judgments do not set a precedent for free movement in general. Similarly, procurement concerns states, and these are subject to the duty of loyalty in Article 4 TEU. Discrimination in purchasing may arguably be seen as a violation of this, in combination with the principles of free movement.[41] The state as contracting partner, like the employer as contracting partner, is subject to wider Treaty obligations than is the case for other actors within the internal market. It may be noted that in *Dundalk*, and to a lesser extent in *Parking Brixen*, the Court emphasized the public nature of the purchaser in reasoning towards the conclusion that its preferences violated the free movement of goods – the suggestion being that the position of a private purchaser, even a large one, would be different.

Yet another explanation – not contradicting the one above but complementing it – of why it is these two areas, and only these two areas, in which free movement restrains contractual preferences, is that there is a broad social and legal consensus that employers and governments have a reduced, or non-existent, right to freedom of contract. Their rights and obligations are different from those of other buyers and sellers.[42] Precisely, the fact that the law reaches the furthest into these two areas suggests that free movement law is in fact following the outlines of freedom of contract as understood in the laws and traditions of the Member States.

In the case of governments, this is obvious. Neither the moral arguments for freedom of contract nor the economic ones provide a basis for governmental contractual freedom that is equivalent to that for private persons. Contractual

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38 ECJ 22 Sep. 1988, Case 45/87 *Commission* v. *Ireland (Dundalk Council)* [1988] *ECR* 4929; ECJ 20 Mar. 1990, Case C-21/88 *Du Pont de Nemours* [1990] *ECR* I-889; ECJ 13 Oct. 2005, Case C-458/03 *Parking Brixen* [2005] *ECR* I-8585.

39 Article 45(2) TFEU.

40 Article 45(1) TFEU.

41 See ECJ 9 Dec. 1997, Case C-265/95 *Commission* v. *France ('Spanish Strawberries')* [1997] *ECR* I-6959.

42 KRZEMINSKA-VAMVAKA, n. 1 above, 144; See also M. KUMM, 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 7(4). *German Law Journal* 2006, p. 342; M. DE MOL, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-discrimination', 18. *Maastricht Journal* 2011, p. 109 at 112.

liberty is not a part of the autonomy that they need to be happy, as it may be for individuals, and it is not essential to the process of societal welfare maximization, which economics suggests that it may be where individual preferences are concerned. Nor is governmental contractual liberty a necessary counterbalance to the risks of regulatory tyranny, a reasonable part of a policy of checks and balances.

The only argument for governmental contractual liberty might be a subsidiarity-based one, which would see devolved levels of government as agents of small communities and the contractual actions of these devolved levels as essentially reflections of these communities' choices.[43] This would draw on both welfare economics and democratic principles to suggest that local communities should be able to express their own preferences in their collective contracting, even if these deviate from those around them. However, while this argument may have merits, it is not reflected in conventional views about freedom of contract, which see this as an essentially private right.[44] In apparently not awarding this right to states, the EU is following legal consensus on freedom of contract, not challenging it.

Employers often are private parties and, by contrast, conventionally would be seen as enjoying a right to contractual freedom. However, it is now the near-universal practice of national legislators, and of the EU legislator, to constrain this right dramatically.[45] Employment is typically subject not only to various non-discrimination norms, but also the content of employment contracts is greatly determined by parties other than the employer or employee, notably the state, trade unions, and other employers as represented in social bargaining processes. The idea that the employer should be able to contract according to their preferences and prejudices has long been narrowed down to the point where freedom of contract, other than the freedom to take the objectively most suited candidate, is the exception more than the rule. To subject employers, therefore, to a non-discrimination principle derived from free movement law is to limit freedom of contract in a way that is highly conventional and once again following national practices rather than challenging them. There may be arguments about precisely which constraints employers should be subject to, but these are mere details of political debate. Any principle that employers should be able to employ whoever they want, on whatever terms they want, has long been abandoned in Europe and much of the rest of the world.

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43 See, e.g., KERBER & VAN DEN BERGH, p. 447.

44 See n. 42 above.

45 For example, Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ 303/16; Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.

It is therefore reasonable to conclude that free movement law only applies to contractual decisions where the party in question is conventionally regarded as having no, or severely diminished, rights to contractual freedom. There are no examples in the case law of the subjection of 'mere' private parties to contractual constraints and little basis in the reasoning of the judgments to think that such subjection will occur. The Court appears to be fitting free movement snugly into a freedom-of-contract jacket.

One question that this leaves is how we may expect the law to develop in the future. What kinds of other contractual constraints, outside of employment or procurement, might be compatible with freedom of contract? What other kinds of parties are conventionally not considered to enjoy this right to the full? Two additional categories of private actors are obvious candidates for a possible application of free movement law: those with market power and those who offer their goods or services publicly on an open market.

To be rejected by one customer or supplier is a shame but is not usually synonymous with a reduction of access to the market.[46] Each customer or supplier is but one among many. However, if that customer or supplier has market power, then it may well be that they comprise so much of the market – or a crucial part of it – that losing the chance to contract with them makes entering that market difficult. This is part of the logic of subjecting government purchasing to legal constraints, the purchasing power of the state being uniquely large.[47] It can also be used to understand the horizontal effect of free movement of workers: The employment market is far less flexible than others, and rejection by an employer will usually impact more on an individual's capacity to enter an employment market than will rejection by a customer in another field. An employer can often be seen as in a dominant position relative to candidates for a job. The law could consistently reject application of the Treaty articles to contracts by most private parties but make an exception for dominant market players, precisely on the grounds that contracts with these players are, unlike with other parties, almost essential for market access. This would amount to an extension of the 'private regulation' line of case law to situations of dominance, with *Ferlini* providing some limited support.[48]

However, private persons with market power are subject to competition law, and the question is whether free movement law has anything to add.[49] It is certainly arguable that direct and indirect nationality discrimination – which would encompass matters such as price discrimination and refusal to supply but perhaps also unjustified rejection of foreign standards and specifications – will fall within

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46 Advocate General Maduro's Opinion, *Viking Line*, n. 1 above, para. 42.

47 C. BOVIS, 'The Regulation of Public Procurement as a key element of European Economic Law', 4. *European Law Journal* 1998, p. 220 at 226–227.

48 See text subsequent to n. 28 above.

49 See Case 178/82 *Van de Haar* [1984] *ECR* 1797.

abuse of dominance under Article 102 TFEU.[50] If the criterion for engaging free movement was weaker than market power in an Article 102 sense, but extended to mere inequality of bargaining power, then free movement would certainly add value, but this extension would raise policing issues again. Inequality of bargaining power is ubiquitous – indeed, equality of bargaining power must be exceptional. The law usually intervenes only when the inequality is unconscionable, and one may well ask why that should be the case short of market dominance (issues of mental competence and so aside).

The relevance of competition law therefore suggests good reasons for free movement to steer clear, since bringing such behaviour within the free movement articles will add to confusion about the functions of different areas of law, while not obviously adding to the substantive constraints on the market actors.[51] On the other hand, one can argue that the normative battle for freedom of contract is already lost – due to competition law dominant actors cannot choose their contractual partners freely – so there is no reason not to let free movement wade into the fray and defend its own goals.[52] In fact, it may well have something substantial to add since the approach to issue of evidence and justification is far simpler in free movement than in competition law. Where a bank or telecoms company refuses to contract or imposes onerous terms on the grounds of nationality or place of residence, it may be easier to rely on the free movement of capital or services, and the (sometimes alarmingly) common-sense case law on restrictions and justifications, than it would be to rely on competition law with its love of intricate economic theorizing and expensive market surveys, even if in principle the competition rules would help.

Yet there is probably a better – more clearly principled and more practical – approach than a focus on market power, with its difficult questions of degree. That is to distinguish between privately made contracts and goods and services offered publicly on an open market. Common situations such as the bank that refuses mortgages on foreign properties, or to foreign customers, or the telecoms company that subjects foreign customers to all kinds of hurdles before connecting them could be addressed via this route. It has the practical advantage that not many companies have market power in the competition law sense, and for the consumer problems often occur where companies adopt parallel policies: for example, all the banks apparently share the same suspicion of foreign properties, entirely independently of each other. It is almost impossible for the ordinary consumer to prove collusion and rely on Article 101 TFEU in such circumstances, and it may indeed not even exist.

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50 See A. JONES & B. SUFRIN, *EC Competition Law*, 3rd edn, OUP, Oxford 2010, pp. 321–322.

51 G. MARENCO, 'Competition between National Economies and Competition between Businesses: A Response to Judge Pescatore', 10. *Fordham International Law Journal* 1987, p. 420.

52 See Opinion of Advocate General Maduro in *Viking Line*, n. 1 above. P. PESCATORE, 'Public and Private Aspects of European Community Law', 10. *Fordham International Law Journal* 1987, p. 373 at 378–379; BAQUERO CRUZ, p. 603.

An approach that said that those offering their goods and services publicly on the open market must respect the non-discrimination norm – market access clearly being of little use in this context, since no individual bank could be said to be hindering market access – would certainly be of practical use to many individuals and further the goal of interstate transactions and would therefore be attractive to the Court. Its impact on the freedom of contract of the offering party could be justified by reference to common practice. As with employers, it is common in national law to subject the public marketplace to certain normative constraints. National law will quite commonly have something to say about the shop that refuses customers of a certain race, sex, age, or sexuality, and indeed, the EU has recently adopted directives addressing discrimination on grounds of sex and race in the supply of goods and services.[53] As with employers, the ideological battle for a pure freedom of contract is long finished, and all that is left is the details of the settlement. Prohibiting private nationality discrimination in this context is a step of limited conceptual importance.

Yet while the application of free movement law to such parties would be defensible and imaginable, and not directly contrary to cases such as *Sapod Audic* and *Vlaamse Reisbureaus* since these did not concern discrimination against consumers, it must be remembered that it would still be a step beyond the case law so far. There is no positive support in the cases for such an extension. The situation is not one of third-party intervention as in *Viking*, a market access argument is not self-evident, and yet absent such an argument it is not clear what might engage the Treaty's non-discrimination ban.

The cases so far therefore suggest that the Court is reluctant to impinge on private freedom of contract rather than seeing free movement law as aiming to protect that freedom. Employment is a special case, and it would be possible to extend the law to the supply of goods and services to the public without shattering its conceptual framework, but even this cannot be taken as a sure thing: In 50 years, there has not been a single case that clearly supports this step, and a few that speak against it. The Court has shown no inclination to take the law anywhere that conventional, even conservative, private law notions of contractual freedom suggest that it should not be. Freedom of contract is leading free movement, not running away from it.

Two final comments may be added. One concerns *Mangold* and *Kücükdeveci*.[54] These important cases, although not about free movement, nevertheless suggest that the principle of non-discrimination applies horizontally throughout the sphere of EU law. However, it is precisely the argument of this article that the Court does not appear to find that private contractual preferences

53 Directive 2004/113, n. 45 above; Directive 2000/43, n. 45 above.

54 ECJ 22 Nov. 2005, Case C-144/04 *Mangold* v. *Helm* [2005] *ECR* I-9981; ECJ 19 Jan. 2010, Case C-555/07 *Kücükdeveci* v. *Swedex*, not yet reported.

generally fall within that sphere. Of course, it has room for manoeuvre, and an extension of the *Mangold* approach remains possible.[55] However, the cases above suggest that there is no desire to extend free movement law in this way, and there is plenty of logical and jurisprudential bases for a continuation of the current abstinent approach.

The second comment concerns what is often claimed to be the divergence between the law on free movement of goods and the other freedoms. The restrictive approach of the Court in *Vlaamse Reisbureaus* or *Sapod Audic* is often contrasted with *Viking Line* or *Walrave* to suggest that horizontal effect is a phenomenon only occurring outside of goods. On the contrary, the analysis in this article suggests that there is no conflict between the goods cases and the others: They concern analytically different situations. In the former, parties to a contract attempt to avoid it by claiming that terms of that contract violate free movement law. In the latter, parties complain that a third party is preventing them contracting. There has been no *Viking Line* concerning goods, and hence, no case where the Court has had to address such third-party interference. *Schmidberger* might have been one, but it was not the demonstrators who were sued – it was the state – so the issue did not arise.[56]

5. Conclusion

Academic discussion of horizontal effect has often concentrated on the types of legal persons to which the law may be applied. This article suggests that the character of the person is rather less important than what that person is trying to do. As when determining what is an undertaking, or what is a service, one should not look at the nature of the institution but at the nature of its actions.[57] In the case of horizontal effect, the question is whether the actor concerned is seeking to restrain the party autonomy of others, in which case free movement law will, in general, intervene, or whether they are exercising their own private contractual preferences, in which case in general free movement will abstain. Free movement has, until now, stuck closely to a path of maximizing individual contractual autonomy.

That free movement has followed this path will not surprise those who criticize it for its undermining effect on national social policies and its relentless individualism.[58] The surprising aspect of the law is however that goes no further

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55 DE MOL, p. 109.

56 ECJ 12 Jun. 2003, C-112/00 *Schmidberger* v. *Austria* [2003] *ECR* I-5659.

57 See JONES & SUFRIN, pp. 128–129; G. DAVIES, 'The Process and Side-Effects of Harmonisation of European Welfare States', *Jean Monnet Working Paper 2/06*, 2006, pp. 15–17.

58 C. BARNARD, 'Viking and Laval: An Introduction', in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, vol. 10, 2007–2008, Hart, Oxford 2008; A.C.L. DAVIES, 'The Right to Strike versus Freedom of Establishment in EC Law: The Battle Commences', 35. *Industrial Law Journal* 2006, p. 75; A. HINAREJOS, 'Laval and Viking: The Right to Collective Action versus EU

than this. By limiting free movement to a protection of party autonomy, the Court has apparently excluded discriminatory contractual preferences from the law, despite the fact that these are almost certainly widespread and that they will have a significant effect on the dynamics of the internal market. Is this a rare example of EU law surrendering effectiveness to personal autonomy and accepting discriminatory preferences as a legitimate limit to integration?

An alternative view is that it is more efficient, and even more effective, to let change come through the exercise of free choice than to try and impose it. It is consistent with a certain faith in markets to believe that people will ultimately explore the opportunities available to them and that liberty changes the person liberated. Party autonomy may be a mechanism for mentality change, and so for deep integration, where compulsion would merely provide a more fragile increase in trade and at considerable practical cost given the difficulties of policing it. One does not need to read the limited legal scope of free movement as an indicator of limited ambition. Indeed, given that both the consistent pursuit of integration and the use of second-order effects are ubiquitous features of EU law, it is more consistent to see free movement as an exercise in integration through mentality change than as a policy that accepts the limits set by current consumer and business preferences.[59]

This invites an explanation of its selective extension into contractual preferences where governments and employers are involved. These parties, it might be speculated, do not learn well enough or fast enough. In the first case, they may not learn at all: There may be reasons why governments will prefer national suppliers unless hounded not to, either derived from public choice theory or from the under-representation of foreign suppliers in the national democratic system.[60] In the second case, market idealism might lead us to think that employers will be led to discard discrimination by a gradual awareness of its pointlessness and inefficiency, just as we may expect other purchasers to do. However, the difference is that employees are human beings who may be seriously harmed by discriminatory rejections, and when issues of dignity and fundamental rights are involved, there may be no time to wait for mentalities to involve.[61] Employing people is different from buying stuff, and the short-term/long-term cost-benefit trade-off is different.

Fundamental Freedoms', 8. *Human Rights Law Review* 2008, p. 714; N. REICH, '*Free Movement* v. *Social Rights in an Enlarged Union* – The Laval and Viking Cases before the ECJ', 9(2). *German Law Journal* 2008, p. 125; J. MALMBERG & T. SIGEMAN, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice', 45. *CMLRev* 2008, p. 1115.

59 See S. DEAKIN, 'Legal Diversity and Regulatory Competition: Which Model for Europe?', 12. *European Law Journal* 2006, p. 440.

60 See, e.g., J. BUCHANAN & G. TULLOCK, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, University of Michigan Press, Ann Arbor 1962; M. POIARES MADURO, *We the Court*, Hart, Oxford 1998.

61 See KUMM, n. 42 above; TRYFONIDOU, n. 14 above.

This interpretation of the logic of the law suggests that free movement is less classically liberal than the adherence to party autonomy might suggest. Personal liberty is not portrayed above as a normative pillar of the internal market but rather an instrument of integration, and indeed of self-realization. The consumer is being both used and manipulated. A consequence is that respect for party autonomy may be conditional: In the event that it seems not to be achieving the transformations hoped, it may be augmented by compulsion without any transgression of principle, either through secondary legislation or through new developments in the case law. The proposition that individuals are likely to evolve when exposed to market liberty is a contingent one rather than an embedded ideological commitment and so open to empirical rebuttal and to setting aside.

Welfare economics, it may be noted, can make no sense of any of this. Despite the inclination of both policymakers and some commentators to look at free movement in terms of conventional economic ideas about market efficiency and increasing welfare, the way it is actually applied is quite divorced from what economics would prescribe. Were free movement to be aimed at welfare increase, in the orthodox economic sense, it would be used to enable increased satisfaction of the consumer's subjective preferences, without either judging or questioning those preferences.[62] The preference manipulation that it in fact embodies is, by contrast, a form of preference rejection and therefore at odds with the lessons of traditional economics.[63] Most notably, where national regulation corresponds to national consumer preferences, for example, by providing a degree of certainty and protection for which the consumer is prepared to pay (in the higher price of goods and services) but which the market is unable to supply, welfare economics would regard this as an efficient and desirable prevention of a possible externality.[64] The Court of course, as is well known, does not.[65]

Its interventions in national regulation are therefore probably welfare reducing. It is implausible to think that it can judge the preferences of national consumers better than the national legislator, and in watering down protective legislation suiting local preferences it creates a market that is less able to provide these consumers with what they want. This immediate and short-term loss must then be justified by longer term goals. Economically, free movement will work, if it works, by changing the preferences of Europeans so that they gradually become

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62 Critically, but with discussion of the orthodoxy, D. SOBEL, 'On the Subjectivity of Welfare', 107. *Ethics* 1997, p. 501; C. SUNSTEIN, 'Willingness to Pay versus Welfare', *John M. Olin Law and Economics Working Paper No. 326*, 2007 (available on <http://ssrn.com>).

63 *Ibid.*

64 P.J. HAMMER, 'Antitrust beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs', 98. *Michigan Law Review* 2000, p. 849; M. GAL & I. FAIBISH, 'Six Principles for Limiting Government-Facilitated Restraints on Competition', 44. *CMLRev* 2007, p. 69.

65 ECJ 20 Feb. 1979, Case 120/78 *Cassis de Dijon* [1979] *ECR* 649.

people for whom a single market is welfare enhancing. There is a deferred welfare gain. Politically, these amended preferences may serve the goal of integration and the associated potential advantages for the stability of Europe and for the EU as an organization and geopolitical actor. Free movement makes sense within this broader picture but not within the narrower one of immediate economic efficiency.

This is somewhat in contrast to one of the common stereotypes of free movement: that it embodies a slavish adherence to economic efficiency and is only tempered by politics where the Court allows derogations or where the European legislator harmonizes. Instead, this article suggests that free movement is a project in transformative social engineering, essentially political, in which party autonomy is employed to trigger social and political change. Immediate economic rationality only enters via the space for derogations, where some degree of – limited – compensation for externalities is permitted to temper the negative welfare consequences of the European consumer's largely unwanted liberty. Free movement will only become welfare-increasing in the longer term, when European consumers have learned to become good Europeans: when freedom of contract has become something that they want.

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